Form 23

Term Sheet—Convertible Debentures, Warrants, and Common Stock

[DRAFT—FOR DISCUSSION PURPOSES ONLY]

[Company]

Summary of Terms for Financing

|  |  |
| --- | --- |
| Seller: | [Company] (the “Company”) |
| Investors: | [\_\_\_\_\_\_\_\_] and/or its affiliates (collectively, “\_\_\_\_\_\_\_\_”), and other qualified institutional investors (collectively, the “Investors”) |
| Issue: | Convertible [Redeemable] Debentures (the “Debentures”)  Warrants to purchase Common Stock of the Company (the “Warrants”)  Common Stock of the Company (the “Common Stock”)  The Debentures, the Warrants, and the Common Stock are collectively referred to as the “Securities.” |
| Debentures Principal Amount: | $\_\_,000,000 |
| Warrant Amount: | Warrants exercisable for \_\_\_\_\_ shares of Common Stock. The exercise price of the Warrants shall be \_\_\_% of the volume-weighted average price of the Common Stock for the [five]-day period beginning one day prior to the Closing Date. |
| Common Stock: | $\_\_,000,000 to purchase \_\_\_%[[1]](#footnote-1) of the Company’s common equity on a post-financing basis. |
| Execution and Terms of Purchase Agreement: | The Investors anticipate that the execution of the definitive agreements reflecting the purchase and sale of the Securities (the “Purchase Agreement”) will occur approximately [five] business days following acceptance of this Summary of Terms (the “Signing Date”). Thereafter, the Company shall make all appropriate filings with the relevant regulatory authority. Promptly following such filings and the satisfaction of any conditions to the purchase and sale of the Securities set forth in the Purchase Agreement, the investment will close (the “Closing”).  The Purchase Agreement will include customary Company representations, warranties, and covenants. The Purchase Agreement also will include customary closing conditions and deliveries including, without limitation, receipt of consents from necessary third parties, and no material adverse change in the condition of, or prospects of, the Company shall have occurred. The Company shall be validly existing and not in default with respect to any of its debt obligations at the time of, and as a condition to, the Closing. |
| Terms of Debentures: | See Appendix |
| Board Representation: | Simultaneously with the Closing, the Company will, if necessary, amend its by-laws to increase the size of the board of directors (the “Board”) to \_\_\_\_ members, and the Company [and certain stockholders] will enter into a voting agreement providing that the Board will consist of \_\_\_\_ members and will be comprised of:  (1) \_\_\_ representatives of the Investors (for so long as the Investors own more than \_\_% of the issued and outstanding Common Stock of the Company or own any shares of Common Stock of the Company and any of the Debentures are outstanding) who will initially be \_\_\_\_\_. However, in the event the Debentures are no longer outstanding and the Investors own less than \_\_\_% but more than \_\_% of the issued and outstanding Common Stock of the Company, and the Company has not defaulted and does not subsequently default on its redemption obligations, then the Investors will only be entitled to \_\_\_ representatives. The Company covenants that so long as the Investors own \_\_\_% of the Shares purchased at the Closing it will nominate \_\_\_\_\_\_ and use its best efforts to have him elected whenever his board seat comes up for reelection by the stockholders. The Company shall enter into individual indemnification agreements with the Investors’ representatives in connection with their serving as directors.  (2)[Add additional details regarding board composition]  [Since board composition is set forth in Company’s articles or certificate of incorporation, a change to the board composition could require stockholder approval. This should be discussed. One alternative could be to have the Company covenant to use its best efforts to obtain stockholder approval following the Closing.] |
| Approval Rights: | Standard approval rights on: equity issuances (subject to customary exceptions); mergers, consolidations, acquisitions and sales; payments of dividends or distributions; a liquidation, reorganization or recapitalization; any redemption or repurchase of stock; changes in the size of the board of directors; amendments to the Company’s charter or by-laws that adversely affects the rights of the Investors; any appointment, election or removal of officers; and borrowings which exceed $\_\_\_\_\_, other than revolving lines of credit provided by lenders. |
| Preemptive Rights: | The Investors, for so long as they hold [10%–15%] of the original number of shares of Common Stock, will have the right to purchase their pro rata share (based on their ownership, including the Warrants, of the outstanding Common Stock of the Company on a fully diluted basis) of any future equity offering by the Company. Underwritten public offerings will be excluded from this right.  Equity issuances at levels less than the Investors’ effective price per share will trigger additional share issuances to the Investors sufficient to reduce their effective price per share to that lower level. The Company will be prohibited from offering participation rights, rights of first refusal, rights of first offer, or similar rights to any holder or prospective holder of any Company securities on terms more favorable than, or in preference to, the rights granted to the Investors. |
| Access to Information: | From the date hereof until [Month] \_\_, 20\_, the Company will permit access to, and will make available to the Investors’ representatives and their counsel for inspection, such information and documents as the Investors reasonably request, and will make available at reasonable times, and to a reasonable extent officers and employees of the Company to discuss the business and affairs of the Company. |
| Expenses: | Whether or not the transaction is consummated, the Company will pay the Investor for all expenses reasonably incurred by it in connection with the transaction contemplated hereby, including legal fees, not to exceed $\_\_\_,000. |
| Exclusivity: | In consideration of the time and expense devoted by the Investors to the transactions contemplated hereby, the Company (including its Board and their affiliates) agrees that, until [Month] \_\_, 20\_ it will not solicit or encourage any offers, engage in any discussions (other than to inform any initiating party that it is subject to this provision), or enter into any agreements or commitments with respect to the purchase of, or the sale, or transfer, or issuance (whether by merger, consolidation, or otherwise) of, (i) any shares of capital stock of the Company or another entity organized by affiliates or any securities convertible into or exchangeable for any such stock for the primary purpose of raising capital, or (ii) all or substantially all of the assets of the Company or any subsidiary thereof. The above provisions are subject to acts by the Board pursuant to their fiduciary duties under applicable law, and if the Board in the exercise of such fiduciary duties determines not to consummate the transactions contemplated hereby prior to the execution and delivery of the Purchase Agreement, the Company shall pay the Investors a “break-up” fee in the amount of $\_\_,000. If the Company receives an alternative proposal that would require the Board, in exercising its fiduciary duties as described above, to determine not to consummate the transactions contemplated hereby prior to the execution or delivery of the Purchase Agreement, the Company shall endeavor to negotiate with the Investors, for a period not to exceed [20] days, a new transaction with the Investors that is comparable to such alternative proposal. |
| Confidentiality: | Subject to required disclosure to governmental agencies and other disclosure required as a matter of law, the existence of this Summary of Terms, the provisions contained herein, as well as the discussions between the parties hereto and their respective agents, will be held in confidence by the parties hereto and their agents and representatives and they will provide such information only to those parties with a need to know of the existence of this Summary of Terms and the provisions herein (such receiving parties to be similarly subject to confidential agreements or duties). The Investors and the Company further agree they will not use any portion of the information and data provided to such party by the other party for any purpose other than the consummation of the transaction contemplated by this Summary of Terms. The existing confidentiality agreement between the parties shall remain in force. |
| Nature of the Document: | The Closing contemplated by this Summary of Terms is subject to a number of conditions, including the Investors’ completion of business, legal, financial, and technical due diligence, mutual agreement upon definitive documentation and no material adverse change affecting the Company prior to the Closing. Accordingly, except as provided above under the captions “Expenses”, “Exclusivity”, and “Confidentiality”, this Summary of Terms does not constitute a legally binding obligation of the Investors or the Company. |
| Governing Law: | This Summary of Terms and the definitive agreements setting forth the terms of the transactions contemplated hereby, if any, will be governed by the laws of the State of New York. |
| Counterparts: | This Summary of Terms may be executed in counterparts, each of which will be deemed to constitute an original but all of which together will constitute one and the same instrument. |
| Expiration: | This offer to enter into this Summary of Terms will expire on [Month] \_\_\_, 20\_. |

APPENDIX: TERMS OF CONVERTIBLE REDEEMABLE DEBENTURES

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| Principal Amount: | $\_\_,000,000 (the “Debentures”) |
| Principal Repayment: | Full payment at end of [\_]-year term or upon an earlier default, subject to the prepayment, redemption, and conversion terms hereof. |
| Interest Payments: | [Base Rate] plus \_\_\_ bps per annum interest on unpaid balance of principal amount, payable in cash quarterly. Default terms to be determined. [Investors may wish to consider a step-up in interest.] |
| Maturity Date: | [\_\_\_\_\_] years from the Closing Date |
| Covenants: | So long as the Debentures are outstanding, the Company will be subject to certain financial and operating covenants customary for a transaction of this type; provided that such financial and operating covenants shall be no more restrictive than those set forth in the agreements executed in connection with the Company’s existing and future senior indebtedness (the “Senior Indebtedness”). |
| Conversion: | The Debentures will be convertible in whole or in part, at any time at the option of the holder, into Common Stock. The number of shares into which the Debentures will be convertible will equal (i) the total principal amount divided by (ii) [\_\_\_]% of the Debenture Price (the “Conversion Price”) per share (subject to proportional adjustments for stock splits, dividends and the like through the time of conversion).  [Investors may wish to consider alternative conversion formula.] |
| Subordination: | Repayment of the Debentures will be subordinated only to the Company’s Senior Indebtedness in amounts not to exceed $\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_. [The Investors will enter into an intercreditor agreement reasonably acceptable to the Investors and the other parties thereto.] To the extent that the Senior Indebtedness is repaid or ceases to exist, and no additional amounts are borrowed from the senior lenders, until additional Senior Indebtedness exists, the Debentures shall be senior to any other indebtedness incurred by the Company in terms of repayment and priority. |
| Defaults and Remedies: | The Debentures will contain standard events of default (including cross-defaults) and remedies upon default (including acceleration of the principal amounts and the right to increased representation on the Company’s board of directors (“Board”)). |
| Prepayment Penalty: | None |
| Forced Conversion: | The Company shall have the right to force the Investors to convert the Debentures into Common Stock at the Conversion Price if the volume weighted average price of the Common Stock closes 100% above the applicable Conversion Price for 20 consecutive trading days (subject to adjustments for stock splits, stock dividends, and the like). |
| Change of Control: | Upon a change of control (to be defined), the Investor will have the right to cause the Company to redeem the Debentures for \_\_\_% of the face value of the Debentures, plus accrued and unpaid interest. |
| Redemption: | In the event that the Company does not meet the financial milestones as set forth below, then the Investors may cause the Company to redeem:  (i) up to 50% of the aggregate amount of the Debentures at any time after the twelve-month anniversary of the initial Closing Date if the Issuer’s Earnings before Interest, Taxes, Depreciation, and Amortization less Capital Expenditures (“Adjusted EBITDA”) for FYE 20\_ is less than $\_\_ million;  (ii) any of the purchased Debentures at any time after the two-year anniversary of the Closing Date if the Adjusted EBITDA for FYE 20\_ is less than $\_\_\_ million.  The Issuer may effect any such redemption, including redemption upon maturity, through the payment of cash or delivery of registered shares of Common Stock in whole or in part. If the Company elects to pay in registered shares of Common Stock, the redemption will be determined according to Market Price at redemption (the “Market Price”), which will be defined as the lower of (i) the Conversion Price, and (ii) 80% of the arithmetic average of the daily volume weighted average prices of the Common Stock for the 20 consecutive trading days ending on the day prior to redemption, but in no event greater than the closing bid price on the day of redemption).  [Investors may wish to consider alternative redemption provisions.] |

Executed as of [Month] \_\_, 20\_.

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|  | [Lead Investor] | |
|  | By: \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ | |
|  |  | Name:  Title: |

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| --- | --- | --- |
| Agreed to and Accepted: | |  |
| [Company] | |  |
| By: \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ | |  |
|  | Name:  Title: |  |

1. Equivalent to $\_\_ share price per share (representing a \_\_% discount to the trailing \_\_-day average closing price as of \_\_\_\_\_) with a current outstanding share count of \_\_\_ million shares. [↑](#footnote-ref-1)